

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL SMYTH II,

Plaintiff,

v.

SOCIAL SECURITY
ADMINISTRATION,

Defendant.

Case No. 08-13723

Robert H. Cleland
United States District Judge

Michael Hluchaniuk
United States Magistrate Judge

REPORT AND RECOMMENDATION
DISMISSAL FOR FAILURE TIMELY EFFECT SERVICE

I. PROCEDURAL HISTORY

This matter is before the Court on a complaint for judicial review following an adverse decision of the Commissioner of Social Security. (Dkt. 1). The complaint was filed on August 28, 2008, and referred to the undersigned for all pretrial purposes. (Dkt. 2). A review of the record in this matter indicates that there has been no return of service of the summons and complaint on defendant. On February 19, 2009, the Court issued an order to show cause why a report and recommendation to dismiss this matter for failure to effect timely service of process should not be issued. (Dkt. 4). Plaintiff was given until April 21, 2009 and cautioned that failure to comply with the order to show cause would result in a

report and recommendation for dismissal based failure to effect service within the time specified. (Dkt. 4).

II. ANALYSIS AND CONCLUSION

[Federal Rule of Civil Procedure 4\(m\)](#) provides that if service is not effectuated within 120 days the Court must dismiss the action without prejudice as to that defendant. “Absent a showing of good cause to justify a failure to effect timely service, the Federal Rules of Civil Procedure compel dismissal.” [Byrd v. Stone](#), 94 F.3d 217, 219 (6th Cir. 1996), citing, [Habib v. General Motors Corp.](#), 15 F.3d 72, 73 (6th Cir. 1994). It is plaintiff’s burden to establish good cause for failing to timely effect service. [Habib](#), 15 F.3d at 73. Further, [Local Rule 41.2](#) provides that if the parties have not taken action within a reasonable time, the Court may enter an order dismissing the case for lack of prosecution.

Plaintiff failed to respond to the Court’s order to show cause. Therefore, the undersigned recommends that plaintiff’s complaint be dismissed without prejudice pursuant to [Rule 4\(m\)](#) and [Local Rule 41.2](#). See [Habib](#), 15 F.3d at 73 (“Absent a showing of good cause to justify a failure to effect timely service, the Federal Rules of Civil Procedure compel dismissal.”).

III. RECOMMENDATION

Based on the foregoing, the undersigned **RECOMMENDS** that plaintiff's complaint be **DISMISSED** without prejudice pursuant to [Rule 4\(m\)](#) and [Local Rule 41.2](#).

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 10 days of service, as provided for in [28 U.S.C. § 636\(b\)\(1\)](#) and [Local Rule 72.1\(d\)\(2\)](#). Failure to file specific objections constitutes a waiver of any further right of appeal. [Thomas v. Arn](#), 474 U.S. 140 (1985); [Howard v. Sec'y of Health and Human Servs.](#), 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. [Willis v. Sec'y of Health and Human Servs.](#), 931 F.2d 390, 401 (6th Cir. 1991); [Smith v. Detroit Fed'n of Teachers Local 231](#), 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to [Local Rule 72.1\(d\)\(2\)](#), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 10 days after service of an objection, the opposing party must file a concise response proportionate to the

objections in length and complexity. The response must specifically address each issue raised in the objections, in the same order, and labeled as “Response to Objection No. 1,” “Response to Objection No. 2,” etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: May 20, 2009

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on _____, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send electronic notification to: Eric J. Frankie, United States Attorney’s Office, and the Commissioner of Social Security.

s/Darlene Chubb
Judicial Assistant